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**IN THE
COURT OF APPEALS OF INDIANA**

BRUCE JACKSON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0709-CR-765
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Judge
Cause No. 49G23-0703-FC-38196

April 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Bruce Jackson appeals his conviction and ten and one-half year sentence for Class C felony possession of cocaine and Class D felony resisting law enforcement. We affirm in part, reverse in part, and remand.

Issues

Jackson raises several issues on appeal, which we restate as:

- I. whether there was sufficient evidence to support the possession of cocaine conviction;
- II. whether the trial court abused its discretion by sustaining certain hearsay objections;
- III. whether the trial court abused its discretion in sentencing him; and
- IV. whether his sentence is appropriate in light of his character and the nature of the offenses.

Facts

The evidence most favorable to the convictions reveals that on March 6, 2007, Indiana State Trooper Brent Lykins attempted to stop Jackson, who was speeding on Interstate 70. Trooper Lykins used his lights and sirens and even made eye contact with Jackson while motioning for him to go to the right shoulder, but Jackson did not pull over. Instead, Jackson exited the highway and continued to evade the trooper, reaching speeds exceeding ninety miles per hour on city streets. The vehicle struck a tree and Jackson ran. Trooper Lykins followed and yelled for him to stop. After jumping a fence, Jackson reached into his pocket and threw two plastic bags to the ground after falling

down. The bags landed within ten feet of him. Once on the ground, Jackson complied with Trooper Lykins's commands not to move.

An Indianapolis Metro police officer assisted Trooper Lykins in handcuffing Jackson and returning him to the area where the vehicles had stopped. Jackson's eyes were bloodshot and glassy and he was "staggering quite a bit" before he fell. Tr. p. 32. A breath test was administered at the station, but was incomplete due to Jackson's failure to give adequate samples. The substance in the plastic bags that Jackson threw was identified as cocaine.

The State charged Jackson with Class A felony possession of cocaine, Class C felony possession of cocaine, Class D felony resisting law enforcement, and Class A misdemeanor operating while intoxicated. Following a bench trial, the trial court granted Jackson's motion for judgment on the evidence as to the Class A felony possession of cocaine charge. The trial court found Jackson guilty of Class C felony possession of cocaine and Class D felony resisting law enforcement, but not guilty of the operating while intoxicated charge. The trial court sentenced Jackson to consecutive sentences of seven and one-half years executed on the cocaine conviction and three years, with six months executed, on the resisting conviction. This appeal followed.

Analysis

I. Sufficiency of the Evidence

Jackson contends that there is insufficient evidence to support his conviction for possession of cocaine. Our standard of review for sufficiency of the evidence claims is well settled. When reviewing the sufficiency of the evidence supporting a conviction, we

will not reweigh the evidence or judge the credibility of witnesses. Staton v. State, 853 N.E.2d 470, 474 (Ind. 2006). We must look to the evidence most favorable to the conviction together with all reasonable inferences to be drawn from that evidence. Id. We will affirm a conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Id.

Specifically, Jackson argues that “Trooper Lykins’ memory of seeing Jackson throw the baggies was colored by the fact that cocaine was later found in the general area.” Appellant’s Br. p. 6. Such an argument invites us to reweigh evidence and judge the credibility of witnesses, which is prohibited on appeal. Trooper Lykins testified “I proceeded to go over the fence after he was already over the fence.” Tr. p. 29. He was thirty or forty feet behind Jackson when “as he fell down—well, he reached inside of his pocket after the fence here, and as he fell down, threw two plastic bags out as he laid on the ground.” Tr. p. 30. Jackson implies that because Trooper Lykins did not mention in his report that drugs were recovered at the scene that Lykins must have found the drugs later and his testimony was inaccurate. We decline this invitation to reweigh evidence and judge the credibility of the State’s witness. Trooper Lykins testified he saw Jackson throw the bags and he collected them as evidence. Sufficient evidence existed to support the conviction for Class C felony possession of cocaine.

II. Hearsay

Jackson contends that the trial court improperly classified certain portions of his testimony as hearsay and erred by sustaining the State’s objections. The first hearsay

objection was made by the State while Jackson testified to what Trooper Lykins said during the arrest. Counsel for Jackson withdrew the question. Next, the State objected while Jackson testified to what another officer on the scene said during the arrest. The trial court allowed the line of questioning to continue. The third objection came while Jackson continued to testify as to what the other officer said. Counsel for Jackson again withdrew the question. During a long answer by Jackson, a fourth objection was made by the State and sustained. Counsel for Jackson continued with another question and did not contest the ruling or make an offer of proof.

Jackson argues that during the course of the above objections he was attempting to introduce testimony regarding what the officers said while they arrested him, which would support his position that he did not possess cocaine. We fail to see how this testimony would have supported such a position. Further, Jackson withdrew his questions and did not make an offer of proof, instead continuing with questioning following the sustained objection. In doing so, he failed to create a record for our review as to the substance, nature, and relevance of this precluded testimony. This issue is waived on appeal. See West v. State, 755 N.E.2d 173, 184 (Ind. 2001); Ind. Evidence Rule 103(a).

III. Abuse of Discretion

Jackson argues that the trial court abused its discretion in sentencing him. Specifically, Jackson asserts that the trial court overlooked his health condition as a mitigating factor. We engage in a four-step process when evaluating a sentence under the current “advisory” sentencing scheme. See Anglemyer v. State, 868 N.E.2d 482, 491

(Ind. 2007). First, a trial court must issue a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

The trial court declared that the aggravating factors outweighed the mitigating factors in an oral sentencing statement. The pronouncement included reasons for imposing the sentence. The trial court stated that the fact that Jackson was recently released from the Department of Correction and on probation at the time of the offense contradicted Jackson’s arguments that he would benefit from a short term of incarceration. Jackson argues on appeal that the trial court overlooked his hernia as a mitigating factor during sentencing. “An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record.” Id. at 493. Although counsel for Jackson argued that serving time in the Department of Correction would be an undue hardship on Jackson because of the spinal pressure caused by the hernia, Jackson did not present any evidence or medical testimony to provide details of his condition. Nor is it clear how the hernia would be more bothersome to Jackson while incarcerated compared to any other situation. We find that the trial court did not overlook Jackson’s medical condition, but instead afforded it no mitigating weight. To the extent Jackson complains

that the trial court should have afforded more weight to this potential mitigator, this claim is not available for our review. See id. at 491.

There appeared to be some confusion following the announcement of the trial court's original sentence of eight years for the cocaine conviction and three years suspended for the resisting conviction. Counsel for Jackson pointed out that the total consecutive sentence¹ was greater than ten years, which exceeded statutory guidelines. See Ind. Code § 35-50-1-2(c) (excepting crimes of violence, the total years of imprisonment for an episode of criminal conduct shall not exceed the advisory sentence for a felony one class higher than the most serious felony the person is convicted). The trial court adjusted the sentence to eight years for the cocaine conviction and two years suspended for the resisting conviction. Then the State pointed out that the resisting conviction was a non-suspendable offense and Jackson needed to serve at least six months. See I.C. § 35-50-2-2(b)(3). The trial court attempted to re-adjust the sentence to comply with statutory guidelines. Counsel for Jackson suggested seven and one-half years on the cocaine conviction and six months executed on the resisting conviction, and the trial court agreed. The abstract of judgment, however, did not accurately reflect these adjustments. Instead, it indicated seven and one-half years executed for the cocaine conviction and three years, with six months executed and two and one-half suspended, for the resisting conviction. This sentence does not comport with statutory guidelines because it exceeds ten years, the advisory sentence for the next highest of class felony, a

¹ Any period of a suspended sentence must be included when calculating the maximum aggregate sentence under Indiana Code section 35-50-1-2(c). Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005).

class B felony. See I.C. § 35-50-2-5. We direct that Jackson be sentenced to two years for the resisting conviction, with six months executed and one and one-half years suspended. Jackson’s revised sentence totals ten years, instead of ten and one-half years.

IV. Appropriateness

We now assess whether Jackson’s ten-year sentence is inappropriate under Indiana Appellate Rule 7(B) in light of his character and the nature of the offenses.² See Anglemeyer, 868 N.E.2d at 491. Although Appellate Rule 7(B) does not require us to be “extremely” deferential to a trial court’s sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. “Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate.” Id.

Jackson acknowledges that his criminal history is lengthy, but argues that because his convictions were not for the “most serious” crimes, the sentence is inappropriate. Appellant’s Br. p. 12. His criminal history spans his entire adult life, going back twenty-four years. It includes prior felony convictions for criminal confinement, robbery, and operating while intoxicated, and multiple misdemeanor convictions for resisting law enforcement, driving while suspended, and public intoxication. His criminal history also includes a variety of juvenile offenses.

² Jackson asks us to consider whether his eight-year executed sentence in the Department of Correction is appropriate, but we consider the entire sentence, including the two suspended years.

Jackson seems to contend that because he was cooperative once handcuffed, that such cooperation boosts his character. We disagree. Prior to his decision to cooperate, Jackson led police on a high-speed chase through city streets. After crashing his car, Jackson ran from police. He was carrying cocaine and attempted to dispose of it by throwing it onto the ground in a public place. Considering the potential danger to the community during Jackson's evasion of police and Jackson's criminal record, the ten-year sentence for these offenses is appropriate.

Conclusion

We conclude that sufficient evidence exists to support Jackson's conviction for possession of cocaine. Jackson's arguments regarding the hearsay objections are waived and without merit. We reverse his sentence and direct the sentence to be revised to seven and one half years for the cocaine conviction and two and one-half years for the resisting law enforcement conviction in order to comport with statutory sentencing guidelines. We remand for the trial court to modify its orders accordingly and to notify the Department of Correction and local probation department of this change. The trial court did not otherwise abuse its discretion in issuing the sentence and the remaining ten-year sentence is appropriate. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

SHARPNACK, J., and VAIDIK, J., concur.